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No. 99-1821

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS S. BURNS, JR., on behalf of himself and all others similarly situated and on behalf of the Barnett Employee Savings & Thrift Plan,

Petitioner,

—v.—

CHARLES E. RICE, THOMPSON L. RANKIN, JACK B. CRITCHFIELD, RITA BORNSTEIN, REMEDIOS DIAZ OLIVER, FREDERICK H. SCHULTZ, JAMES L. BROADHEAD, ALVIN R. CARPENTER, STEWART TURLEY, CLARENCE V. MCKEE, MARSHALL M. CRISER, and JOHN A. WILLIAMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly applied the settlor/fiduciary dichotomy set forth in this Court's rulings in *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), and *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999) (and recently confirmed in last month's decision in *Pegram* v. *Herdrich*, 120 S. Ct. 2143 (2000)), when it held that the determination by a corporate board of directors pursuant to a specific provision in the company's 401(k) plan — which authorized the board to determine on a case-by-case basis whether or not to treat a given corporate transaction as a Change in Control and thereby whether to provide employees extraordinary additional unaccrued benefits — was a settlor act performed in a corporate capacity and not a fiduciary act of plan administration.

PARTIES TO THE PROCEEDING

Mr. Thomas S. Burns, Jr. is the sole petitioner in this action. The Barnett Employee Savings & Thrift Plan is not, and never has been, a party to this proceeding.*

Respondents in this action were members of the Board of Directors of Barnett Banks, Inc. as of 1997 — Mr. Charles E. Rice, Mr. Thompson L. Rankin, Mr. Jack B. Critchfield, Ms. Rita Bornstein, Mr. Remedios Diaz Oliver, Mr. Frederick H. Schultz, Mr. James L. Broadhead, Mr. Alvin R. Carpenter, Mr. Stewart Turley, Mr. Clarence V. McKee, Mr. Marshall M. Criser, and Mr. John A. Williams.

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* The caption to Petitioner's petition is inaccurate. The omission of "on behalf of" before the Barnett Employee Savings & Thrift Plan inaccurately suggests that the Plan itself was a plaintiff or appellant in the courts below, which it was not. *See* App. 23, 28. This Court's clerk's office appears to have been misled by this omission, in that the docket lists this case as "Thomas S. Burns, Jr., etc., and Barnett Employee Savings & Thrift Plan, Petitioners v. Charles E. Rice, et al." The Plan is *not* in fact a participant in this case.

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STATEMENT OF THE CASE

A. Nature of the case

In connection with the merger of Barnett Banks, Inc. and a subsidiary of NationsBank Corporation, the Barnett Board of Directors determined not to treat the transaction as a "Change in Control" under § 4.5 of the Barnett Employee Savings & Thrift Plan (the "BEST Plan" or the "Plan"). That provision provided for a large extraordinary allocation of Barnett stock to BEST Plan participants in the event of a Change in Control transaction — a contingent, unaccrued benefit. It is not disputed that the Barnett Board's decision (i) complied with the terms of the Plan, which expressly provided in § 4.5 that the Board could determine not to treat a particular transaction as a Change in Control, and (ii) in no respect impacted any employee's accrued benefits under the Plan. Petitioner nonetheless alleged that the Barnett Board's exercise of its unquestioned discretionary authority under the Plan constituted a breach of fiduciary duty under ERISA.

B. Statement of facts

The BEST Plan was a defined contribution retirement savings plan. Eligible employees had individual accounts under the Plan to which they could contribute a portion of their base salary, tax-deferred. Barnett matched the employees' contributions on a dollar-for-dollar basis, with either cash or shares of Barnett stock. App. 30-31.*

The BEST Plan was authorized to take out an "Acquisition Loan" to purchase shares of Barnett stock. These "Financed Shares" were pledged as security for the Acquisition Loan, and were set aside in a separate "Suspense Account." The Financed Shares were available to Barnett to fund its annual matching contributions under the Plan. The

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* "Pet." refers to the Petition for Writ of Certiorari. "App." refers to the Appendix accompanying the Petition.

Plan required Barnett to contribute to the Plan each year the amount then due on the Acquisition Loan; that contribution was used to pay down the Acquisition Loan; a corresponding portion of the Financed Shares was released from the Suspense Account; and Barnett, in turn, used those released shares to satisfy its matching contribution obligations for that year by allocating the shares to participants' individual accounts. The Acquisition Loan and Suspense Account enabled Barnett to pre-fund its future matching obligations and served as a means of corporate finance. As of December 31, 1997, there was over $50 million outstanding on the Acquisition Loan, and over 3,300,000 Financed Shares in the Suspense Account, which petitioner alleged had a market value in excess of $200 million. App. 31-32.

Section 4.5 of the BEST Plan provided that certain additional payments could be triggered upon a defined "Change in Control" of Barnett. Under § 4.5, *unless the Barnett Board determined otherwise*, a Change in Control event would trigger the following: (i) Barnett would be required to make an additional extraordinary contribution to the BEST Plan to be used to repay the entire outstanding balance of the Acquisition Loan; (ii) all Financed Shares would then be released from the Suspense Account; and (iii) the released Financed Shares would be allocated to employees' individual accounts. Triggering § 4.5 thus would have caused Barnett to make a very large additional contribution to the Plan, to forfeit its ability to fund future matching contributions with the Financed Shares, and to provide a very large additional payment to the employees by allocating the Financed Shares to their accounts. App. 32-33.

Given the financial consequences to Barnett of triggering § 4.5, it was necessarily part of the design of the BEST Plan that the Barnett Board retained complete and unfettered discretion to determine that a given transaction would *not* be

treated as a Change in Control under the Plan. Accordingly, § 4.5(a) of the Plan provided:

> [N]o Change in Control will be considered to have occurred if, before the time when a Change in Control would otherwise be considered to have occurred, the Board (as it exists before such event occurs) determines that it will not treat the event as a Change in Control.

App. 33. The BEST Plan thus expressly entitled the Barnett *Board* — as opposed to the plan administrator — to deactivate § 4.5 with respect to a transaction that would otherwise have constituted a Change in Control (for example, a friendly, board-approved transaction in which the board determined it was in the best interest of the corporation not to trigger the extraordinary additional payment at a cost to shareholders of hundreds of millions of dollars).

On August 29, 1997, Barnett entered into a merger agreement with NationsBank. Pursuant to § 4.5(a) of the BEST Plan, the Barnett Board passed a resolution dated December 17, 1997 setting forth its determination not to treat the transaction as a Change in Control under the Plan. App. 30, 33.

The merger was approved by the Barnett shareholders on December 19, 1997, and was consummated on January 9, 1998. App. 30.

C. Course of proceedings and disposition in the court below

On March 16, 1998, petitioner commenced this action against the former Barnett directors in the District Court for the Middle District of Florida. The complaint, as amended, alleged that the Barnett directors breached a fiduciary duty under ERISA when they determined not to treat the Barnett/NationsBank merger as a Change in Control under § 4.5 of the BEST Plan. Defendants moved to dismiss the action under Fed. R. Civ. P. 12(b)(6) on the ground that, as a mat-

ter of law, the directors' determination was not a fiduciary act under ERISA. The district court granted the motion by Order dated December 10, 1998. App. B.

On February 17, 2000, in an unpublished per curiam opinion, the Eleventh Circuit affirmed the district court's dismissal of the case. App. A. The Eleventh Circuit's affirmation was predicated on the settled settlor/fiduciary dichotomy under ERISA and the prior precedents of this Court. App. 25-26. Applying that doctrine to the particular provisions of § 4.5 of the BEST Plan, the Eleventh Circuit held that "the Defendants were unquestionably acting as settlors in determining that the merger should not be deemed a change of control for purposes of the BEST Plan"; that "[t]he Board's vote simply eliminated purely contingent and wholly unaccrued and non-vested benefits"; and "[t]hat the Board accomplished this through an existing provision of the Plan rather than an amendment is irrelevant; the effect of the action is what is key." App. 26.

REASONS FOR DENYING THE WRIT

The unpublished decision below is correct and does not conflict with any decision of this Court or other Courts of Appeal. As such, review by this Court is not warranted.

A. There is no conflict with any decision of this Court.

There is no conflict between the Eleventh Circuit's opinion and the precedents of this Court. The Eleventh Circuit directly followed this Court's clear precedent established in *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), and *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432 (1999), and properly applied that precedent to the particular provisions of § 4.5 of the BEST Plan. This case simply involved the application of settled law to a specific (if not unique) factual situation.

In *Varity*, *Lockheed*, and *Hughes*, and most recently in *Pegram* v. *Herdrich*, 120 S. Ct. 2143 (2000), the Court recognized the settlor/fiduciary dichotomy that is "rooted in the text of ERISA's definition of fiduciary." *Lockheed*, 517 U.S. at 890. Under the statutory definition,

> [A] person is a fiduciary with respect to a plan *to the extent* (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (ERISA § 3(21)(A)) (emphasis added).

Thus, a person acts in a fiduciary capacity under ERISA *only* "to the extent" that he or she is managing plan assets, rendering investment advice, or administering the plan. When undertaking *other* activities, such as determining the level of benefits to be provided, the actions of an employer/plan sponsor are equivalent to those of a settlor of a trust and ERISA fiduciary duties do not attach. *See Hughes*, 525 U.S. at 444 ("ERISA's fiduciary duty requirement simply is not implicated where [an employer], acting as the plan's settlor, makes a decision regarding the form or structure of the plan such as who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated"); *Lockheed*, 517 U.S. at 890 (person is a fiduciary only when "fulfilling certain defined functions" set forth in ERISA § 3(21)(A), quoting *Siskind* v. *Sperry Retirement Program*, 47 F.3d 498, 505 (2d Cir. 1995); "[p]lan sponsors who alter the terms of a plan do not fall into the category of

fiduciaries"); *Pegram*, 120 S. Ct. at 2152-53 (employer under ERISA "may wear different hats"; employers do not act as ERISA fiduciaries in taking actions "to the disadvantage of employee beneficiaries, when they act as employers . . . or even as plan sponsors (*e.g.*, modifying the terms of a plan as allowed by ERISA to provide less generous benefits)"; "an employer's decisions about the content of a plan are not themselves fiduciary acts"); *Varity*, 516 U.S. at 502-04 (setting forth settlor/fiduciary dichotomy).

The Eleventh Circuit correctly followed these precedents in ruling that the Barnett Board's § 4.5 determination — a decision about the amount of benefits to be provided to plan participants — was a non-fiduciary plan design decision. Under the settlor/fiduciary dichotomy laid out in *Varity*, *Lockheed*, *Hughes*, and now *Pegram*, that determination was a non-fiduciary settlor decision that the Board was entitled to make "for any reason at any time." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Whether Barnett acted by amendment, determination, resolution, or otherwise is irrelevant; however such decision was implemented, ERISA simply does not "mandate what kind of benefits employers must provide." *Lockheed*, 517 U.S. at 887.

Petitioner nonetheless seeks to evade the settlor/fiduciary dichotomy by asserting — without any support in this Court's precedents or otherwise — that the determinative element in the dichotomy is whether the employer/plan sponsor sets the level of benefits for plan participants (a) through an "amendment" of the plan document, or (b) through other means such as the board resolution challenged in this case. Pet. 13-14. Petitioner concedes that if the employer/plan sponsor chooses not to provide an additional unaccrued benefit by terminating, amending, or modifying a plan, then such an act is done as a settlor and fiduciary duties do not attach. Pet. 14. According to petitioner, however, if an employer/plan sponsor makes that very same level

of benefits decision pursuant to a plan provision specifically permitting the employer to make that decision, the employer/plan sponsor is *ipso facto* to be deemed to be performing a fiduciary act of plan administration. Pet. 18. On that basis alone, petitioner asserts a supposed conflict between the Eleventh Circuit's opinion and this Court's precedents.

There is no support in this Court's precedents (or reason) for petitioner's illogical position that only plan amendments are non-fiduciary under ERISA. Rather, both ERISA's text and this Court's cases are precisely to the contrary. Under ERISA § 3(21)(A)'s functional definition of fiduciary, an employer is a fiduciary with respect to the plan *only* "to the extent" that it engages in one of the enumerated functions, *i.e.*, management of plan assets, rendering of investment advice, or administration of the plan. Contrariwise, when an employer makes plan design decisions — determining the *level* or *amount* of benefits to be provided (as opposed to particular participants' *eligibility* for benefits) — it acts as settlor/plan sponsor and no fiduciary duties attach. This Court confirmed that basic proposition in *Hughes*, stating that "ERISA's fiduciary duty requirement simply is not implicated" when an employer "acting as the plan's settlor, makes a *decision* regarding the form or structure of the plan *such as who is entitled to receive plan benefits and in what amounts*, or how such benefits are calculated." 525 U.S. at 444 (emphasis added). And as stated in *Pegram*, "an employer's decisions about the content of a plan are not themselves fiduciary acts." 120 S. Ct. at 2153.

The basis for the supposed conflict with this Court's precedents posited by petitioner is thus entirely illusory. The world is not divided between (a) "fiduciary" acts and (b) "amendments," but rather between (a) the specified fiduciary functions of management and administration enumerated in § 3(21)(A), and (b) all other decisions, including the sett-

lor/plan design functions of setting benefit structures and amounts, that Congress has decided should not be treated as fiduciary matters. It is on this critical distinction that this Court's opinions rest when they make clear that employer decisions as to benefit structures and amounts are settlor/plan design matters, not fiduciary matters. *See Lockheed*, 517 U.S. at 890-91; *Hughes*, 525 U.S. at 443-45; *Pegram*, 120 S. Ct. at 2152-53 (ERISA fiduciary duties attach "only 'to the extent' that he acts in such a capacity in relation to a plan"; fiduciary means "performing a fiduciary function" specified in § 3(21)(A)). There is nothing in the ERISA statute, the case law, or common sense that supports petitioner's position that only amendments are non-fiduciary and that everything else — including even benefit level determinations that the plan itself leaves to the employer's discretion — is fiduciary. The Eleventh Circuit was correct in noting that the petitioner had "failed to fully appreciate" the settlor/fiduciary dichotomy delineated by this Court's precedents — "a distinction between plan administration, which is fiduciary, and settlor-type functions, which are not fiduciary." App. 25-26 (discussing *Lockheed* and *Hughes*).

It surely makes no sense, and finds no support in this Court's precedents, to contend — as does petitioner — that while an employer is generally entitled to eliminate unaccrued benefits under the settlor/fiduciary dichotomy, it cannot do so when the plan at issue expressly and specifically authorizes it to do so.

Nor is there any substance to petitioner's suggestion that this Court's decision in *Varity* automatically renders fiduciary the exercise of any discretionary authority under a plan — even as to matters that do not constitute management or administration of the plan. Pet. 16, 19-20. To the contrary, *Varity* noted that ERISA "limit[s] the scope of fiduciary activity to discretionary acts of plan 'management' and 'administration.' " 516 U.S. at 502. In unremarkably hold-

ing that an administrator's dissemination of false information about plan benefits could constitute a fiduciary breach, *Varity* reaffirmed that whether or not a particular action is "administration" depends firstly on the "common understanding" of the term and, if that is not dispositive, resort should be had to (a) the statutory ERISA provisions regarding the function of administration and (b) the general activities of administrators. *Id.* at 502-03. The decision contested here — whether to make discretionary allocations to plan participants — is a paradigmatic plan design action by a settlor and falls within no one's "common understanding" of plan administration. Nothing in ERISA makes such level of benefits decisions, or anything like them, part of the administrative responsibilities of plan administrators.

While petitioner emphasizes the sentence in *Varity* about "trust law understanding" of administration to be the performance of duties and the exercise of powers conferred by the trust document (*id.* at 502), that sentence only defines the scope of an administrator's authority when it is performing administration; it does not purport to redefine everything that an employer does as "administration" simply because the action is called for by a plan document.* Indeed, as petitioner nowhere disputes, *no court has ever held — or even suggested — that an employer/plan sponsor's determination whether to make a special contribution to a plan so as to provide an additional unaccrued benefit can be deemed administration of a plan.* To the contrary,

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* Only a year before *Varity*, this Court held that when an employer exercises power conferred by a plan document to amend the plan, it does not act in a fiduciary capacity. *See Curtiss-Wright*, 514 U.S. at 76, 78. That ruling was confirmed by the Court post-*Varity*, first in *Lockheed*, 517 U.S. at 890, and again in *Hughes*, 525 U.S. at 443. A determination whether to amend a plan is as much a "discretionary" decision made pursuant to "a power conferred by" the plan as is the particular § 4.5 determination at issue here.

such determinations as to level of benefits have consistently been deemed non-fiduciary matters of plan design and settlor function. *E.g.*, *Hughes*, 525 U.S. at 444; *Curtiss-Wright*, 514 U.S. at 78; *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994). Petitioner's contention that the Eleventh Circuit "ignored" *Varity* (Pet. 19) is also inaccurate. The Eleventh Circuit simply followed this Court's post-*Varity* cases, *Lockheed* and *Hughes*, that had a more direct bearing on the issue under consideration in this case. App. 25-26.

In addition, this Court's recent decision in *Pegram* appears irreconcilable with petitioner's contention that the exercise of discretion under a plan is inherently fiduciary. It appears that the plaintiff in *Pegram* contended that fiduciary duties attached to discretionary treatment determinations made by the HMO, through its physicians, under a plan that either specifically or generally provided for such discretionary determinations. *Pegram*, 120 S. Ct. at 2153-54; *see also Herdrich* v. *Pegram*, 154 F.3d 362, 372 (7th Cir. 1998), *rev'd*, 120 S. Ct. 2143 (2000). After expressing "doubt that Congress intended the category of fiduciary administrative functions to encompass the . . . determinations at issue here," this Court rejected the claim. *Pegram*, 120 S. Ct. at 2156. Because the challenged determinations appear to have been made under a plan providing the discretion to make such determinations, and in any case clearly did not involve any amendment or other alteration of the plan document, this Court's holding in *Pegram* implicitly rejected petitioner's contention that all exercise of discretionary authority under a plan is inherently fiduciary.

Finally, petitioner's further point that "employers, acting as plan administrators, make fiduciary decisions regarding nonvested and unaccrued benefits of participants" such as whether or not to pay a particular type of medical claim, is irrelevant. Pet. 12-13. That argument does not on its face

suggest any conflict with any precedent of this Court, and, in all events, is incorrect as to plans that specifically reserve to the employer (not the plan administrator) the right to make such determinations. *See, e.g., Hamilton* v. *Air Jamaica, Ltd.*, 945 F.2d 74, 77-78 (3d Cir. 1991), *cert. denied*, 503 U.S. 938 (1992) ("nothing in ERISA prevents [an employer] from providing its employees with benefits on a case by case basis — as long as that limitation is explicitly stated as part of the plan"). Beyond that, and more fundamentally, the § 4.5 provision of the BEST Plan calls for a decision respecting the *level of benefits* to be provided under the Plan — a function completely different than the processing and calculating of an individual participant's claim (or determining the eligibility of a participant) under a plan's specific provisions that provide a guaranteed benefit (like medical claim coverage). The § 4.5 provision itself illustrates the difference: deciding *whether* to trigger § 4.5 is entirely different than deciding the specific amount to be allocated to each plan participant in the event § 4.5 were triggered. The latter function is an act of "plan administration"; the former is not. *See, e.g., Ames* v. *American Nat'l Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999) (company's decision regarding availability of benefits in connection with corporate transaction was "a design decision, not a decision implicating an individual's rights to specific benefits, and as such, [the employer] was free to make it for business reasons").

B. There is no conflict with any decision of another circuit.

The Eleventh Circuit's opinion is also entirely consistent with all other circuit court decisions rendered under this Court's precedents. All of the circuit courts to have considered the issue have ruled that an employer/plan sponsor's discretionary determination made under a power conferred by a plan as to the level of benefits to be provided to plan

participants is a non-fiduciary act of plan design and *not* a fiduciary act of plan administration. Accordingly, the supposed conflict between the opinion below and this Court's precedents posited by petitioner is not only imaginary, but belied by the unbroken line of appellate authority following this Court's precedents in rejecting petitioner's position.

Petitioner implicitly concedes the absence of circuit court support for his novel proposition through his failure to cite to any circuit court case other than *Herdrich* v. *Pegram*, 154 F.3d 362 (7th Cir. 1998), *rev'd*, 120 S. Ct. 2143 (2000), a case that this Court recently reversed by unanimous decision and that petitioner cites only for the general proposition that "Congress intended section 3(21)(A) of ERISA be broadly interpreted." Pet. 15. Just as the Eleventh Circuit rejected petitioner's argument, the Third, Fourth, and Eighth Circuits have rejected similar contentions under the settlor/fiduciary dichotomy set forth in ERISA and in this Court's precedents. No circuit court has reached a contrary result; petitioner does not claim otherwise.

The Third Circuit recently spoke directly to the issue here. In *Noorily* v. *Thomas & Betts Corp.*, 188 F.3d 153 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 1555 (2000), the plan at issue provided for severance benefits only when the company, acting through the terminating manager, "believes the granting of such pay is appropriate." *Id.* at 156. The Third Circuit upheld a denial of benefits under that provision, holding that the provision provided for the non-fiduciary exercise of discretion even though (just as here) the company's action was not made through a plan amendment, but through a provision of the plan providing for an event-by-event discretionary determination:

> [T]o the degree that the plan gives an employer discretion, the employer is not a fiduciary when it makes determinations according to the plan's terms that affect employees' eligibility for benefits.

. . .

> In sum, then, the employer acts as a fiduciary when administering a plan but not when designing *or making business decisions allowed for by a plan*, even though in all three situations its determinations may impact on its employees.

Id. at 158 (emphasis added). Previously, in *Bennett* v. *Conrail Matched Savings Plan Admin. Comm.*, 168 F.3d 671 (3d Cir.), *cert. denied*, 120 S. Ct. 173 (1999), the Third Circuit also had occasion, as did the Eleventh Circuit below, to apply the settlor/fiduciary dichotomy in the precise context of plan suspense account assets. The Third Circuit there likewise rejected a fiduciary duty claim challenging an employer's determination regarding the use of a suspense account — which the Third Circuit held to be a settlor function not implicating ERISA fiduciary duties under the "two hats" settlor/fiduciary dichotomy, based on this Court's decisions in *Lockheed* and *Hughes*. *Id.* at 679.

The Eighth and Fourth Circuits have also applied the settlor/fiduciary dichotomy in holding that discretionary plan design or level of benefit decisions made under a provision of a plan document (and not by amendment of the plan) are non-fiduciary. In *Adams* v. *LTV Steel Mining Co.*, 936 F.2d 368 (8th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992), the Eighth Circuit reviewed the denial of benefits under a plan provision providing for retirement benefits if LTV "considers that [the] retirement would . . . be in its interest." *Id.* at 369. The Eighth Circuit held that such discretionary determinations made under the plan did not implicate fiduciary duties: "We conclude LTV acted as an employer, not a fiduciary, in deciding whether the employees' early retirements were in the company's interest." *Id.* at 370. Similarly, in *Dzinglski* v. *Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989), the Fourth Circuit considered a plan provision requiring the "mutual stipulation of

both the employee and Weirton that the employee's retirement is in their respective interests." *Id.* at 1077. The court held that discretionary determinations made under this plan provision were "not fiduciary in nature" because Weirton made the determination in its capacity as employer, not as plan fiduciary. *Id.* at 1079-80.

Noorily, *LTV*, *Dzinglski*, and this case are thus all consistent in rejecting petitioner's illogical contention that the exercise of discretion under a plan is *ipso facto* a fiduciary act of plan administration or management. There is no conflicting, contrary precedent.

This uniform case law refutes petitioner's unsupported position that only formal plan amendments are settlor acts or plan design decisions, or that there is any conflict between the Eleventh Circuit decision below and established ERISA precedent. As the uniform precedents establish, nothing in ERISA prohibits a company from designing a plan that provides for the potentiality of future contingent benefits to be determined by the employer, as employer, at a later date. That an employer chooses to postpone its decision respecting the specific level of benefits to provide in specified contingencies does not make that decision any less a settlor/plan design decision, or somehow transform that decision into a fiduciary act of plan administration.

Moreover, as the decision below recognized (App. 26), petitioner's position is also irreconcilable with the long-settled doctrine, under the settlor/fiduciary dichotomy, that "ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued." *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *Accord*, *e.g.*, *Owens* v. *Storehouse, Inc.*, 984 F.2d 394, 397 (11th Cir. 1993); *Adams* v. *Avondale Indus., Inc.*, 905 F.2d 943, 947-48 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Dougherty* v. *Chrysler Motors Corp.*, 840 F.2d 2, 3 (6th Cir. 1988).

This Court rejected petitions for writs of certiorari in *LTV*, *Dzinglski*, *Conrail* and — most recently — *Noorily*. *LTV*, 502 U.S. 1073 (1992); *Dzinglski*, 493 U.S. 919 (1989); *Conrail*, 120 S. Ct. 173 (1999); *Noorily*, 120 S. Ct. 1555 (2000). It is respectfully submitted that the same course is appropriate here.

C. The unpublished per curiam Eleventh Circuit opinion is not worthy of certiorari.

This case is not worthy of certiorari for two additional reasons. First, the Eleventh Circuit per curiam opinion is unpublished, and, as such, it is not binding precedent under the Eleventh Circuit Rules. 11th Cir. R. 36-2.

Second, the opinion below turned only on the application of the settled legal regime under *Varity*, *Lockheed*, and *Hughes* to the particular facts individual to this case, that is, whether the Barnett Board's determination not to trigger § 4.5 of the BEST Plan was a settlor act or a fiduciary act. Accordingly, this case is not an appropriate case for certiorari, as this Court's rules specifically provide that cases that primarily involve the alleged misapplication of a properly stated rule of law are rarely considered by this Court on a writ of certiorari. Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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